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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 104

ADIRONDACK TRANSIT LINES, INC.,
Appellant,

vs.

HUDSON TRANSIT LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

MARTIN J. KELLY, JR.,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants,

ADIRONDACK TRANSIT LINES, INC.,
Defendant-Intervenor

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE OF THE UNITED STATES DISTRICT COURT ENTERED AND FILED IN THE ABOVE ENTITLED CAUSE ON FEBRUARY 28, 1949.

Adirondack Transit Lines, Inc., the defendant-intervenor in the above cause, having presented its petition for appeal accompanied by its assignment of errors now files its statement pursuant to Rule XII of the General Rules of the United States Supreme Court as to the basis upon which it is contended that the Supreme Court of the United States

has jurisdiction on appeal to review the final judgment or decree of the United States District Court for the Southern District of New York entered and filed on February 28, 1949 in the above entitled cause.

(A) The Statutory Provisions Believed to Sustain the Jurisdiction

The present appeal is from a final decree of a three judge court of the United States District Court for the Southern District of New York which final decree annulled and set aside in part a final order of the Interstate Commerce Commission granted by said Commission to the appellant-defendant-intervenor, Adirondack Transit Lines, Inc., as more fully hereinafter set forth.

Title 49 of the United States Code, Section 305, states as follows:

> "(g) Court Review of Commission's Orders; Compelling Commission to Take Jurisdiction. Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title."
>
> "(h) Application of Section 17 of This Title. All the provisions of section 17 of this title shall apply to all proceedings under this chapter."

Title 49 of the United States Code, Section 17, states as follows:

> "(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, sus-

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pend or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

At the time the within cause was initiated and commenced in the District Court it was brought pursuant to Title 28 of the United States Code, Section 41, Sub. 28, which states as follows:

"Original Jurisdiction. The district courts shall have original jurisdiction as follows:

(28) Setting Aside Order of Interstate Commerce Commission. Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, §§ 24, 207, 36 Stat. 1091, 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

Title 28, United States Code, Section 41, Sub. 28 was repealed by act of June 25, 1948, c. 646, § 39, 62 Stat. 992 effective Sept. 1, 1948. The present applicable statute is Title of 28 of the United States Code, Section 1336 which states as follows:

"Interstate Commerce Commission's Orders. Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Title 28 of the United States Code, Section 2325, states as follows:

"Injunction; Three-Judge Court Required. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in

part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Title 28 of the United States Code, Section 1253, states as follows:

"Direct Appeals from Decisions of Three-Judge Courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Title 28 of the United States Code, Section 2101, subdivisions a and b state as follows:

"Supreme Court; Time for Appeal or Certiorari; Docketing: Stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final

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judgment or decree in question herein by virtue of the express statutory provisions above set forth.

(B) This Proceeding or Action Involves the Below Quoted Statute of the United States Interstate Commerce Act

> "Section 207. Issuance of Certificate—(a) Issuance Authorized to Qualified Applicants for Regular Routes and Between Fixed Termini.—Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, However,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. (Part II, sec. 207, Aug. 9, 1935, c. 498, sec. 1, 49 Stat. 551.) (Title 49, U. S. C. Sec. 307a)."

Section 210 referred to in the above quoted section 207 (a) deals with dual operation under permit and a certificate, which section is not involved in the within proceeding or action.

Subdivision b of Section 207 restricts any holder of a certificate from acquiring proprietary or property rights in the use of public highways, which subdivision is not involved in the issues of the within action or proceeding.

(C) The Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which Application for Appeal Was Presented.

The final judgment or decree herein sought to be reviewed was dated, made, entered and filed in the office of the Clerk of the United States District Court for the Southern District of New York on February 28, 1949. The application for appeal herein was presented on the 24th day of March, 1949.

(D) Statement Showing the Nature of the Case and the Ruling of the Court Bringing the Case Within the Jurisdictional Provisions Set Forth Herein and Cases Believed to Sustain the Jurisdiction.

On June 4, 1937, Adirondack Transit Lines, Inc., the defendant-intervenor herein, hereinafter referred to as "Adirondack" received its "grandfather" certificate pursuant to the Interstate Commerce Act, Part II thereof, Section 206, authorizing it to carry passengers and their baggage, mail and express as a motor common carrier for hire in interstate commerce for its operations over described routes which lead from New York City, New York, to Weehawken, New Jersey, and thence to Kingston, Saugerties and Saranac Lake, New York. Such authority was from time to time thereafter extended to further points but such extensions did not affect the issues involved herein. Until the opening of the Lincoln Tunnel in December 1937, Adirondack used the ferry between Weehawken, New Jersey and New York City, New York, to traverse the Hudson River. After the Tunnel was opened to vehicular traffic, Adirondack used the Tunnel in the belief that its "grandfather" certificate authorized such use. In Lincoln Tunnel Applications, 12 M. C. C. 184, 196, the Interstate Commerce

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Commission ruled that use of the Tunnel was such a change in operations as to require a certificate of public convenience and necessity. Following this ruling, the Interstate Commerce Commission held that Adirondack's use of the Tunnel was unlawful; and its decision was sustained in Adirondack Transit Lines v. United States, 59 F. Supp. 503, Aff'd, 324 U. S. 824. Thereafter Adirondack continued its use of the Tunnel under temporary authority granted by the Interstate Commerce Commission. Thus, since the opening of the Tunnel Adirondack has not operated by way of the ferry.

On July 13, 1944, Adirondack filed its application with the Interstate Commerce Commission, pursuant to Section 207, Interstate Commerce Act, Part II, for a certificate of public convenience and necessity in order to obtain permission to substitute the Tunnel route for the ferry route. After a hearing, the Examiner recommended issuance of a certificate of convenience and necessity authorizing Adirondack to use the Lincoln Tunnel as its route between New York City, New York and Weehawken, New Jersey, but restricted its carriage of traffic moving between New York City, New York, on the one hand, and, on the other, points in New York State on Adirondack's authorized routes. This order, therefore, would have eliminated service on Adirondack's intermediate route for a distance of approximately thirty miles between New York City and points in New Jersey. Both Adirondack and protestants including the plaintiff, Hudson Transit Lines, Inc. filed exceptions to the extent of the restriction. Adirondack desired a shortening of the restricted area; Hudson Transit desired an extension thereof. The Examiner's recommendation was modified by the Interstate Commerce Commission, Division 5, which by order of July 3, 1946, set the restriction at Monroe, New York, a point 46 miles from the city.

The Interstate Commerce Commission as a whole approved this decision on January 6, 1947, by denying Adirondack's petition for reconsideration. Thereafter, upon a second petition for reconsideration, the Interstate Commerce Commission on April 7, 1947, reopened the proceeding and sent it back to its Division 5 to determine upon the existing record whether and to what extent the restriction upon Adirondack's service should be modified. On July 8, 1947, the Interstate Commerce Commission, Division 5, issued its report and order modifying its former order of July 3, 1946, so as to set the northerly restrictive point at Paramus, New Jersey, instead of Monroe, New York. This point is approximately seventeen miles from New York City. The plaintiff moved for reconsideration and further hearing, but this was denied by the Interstate Commerce Commission by order dated October 13, 1947.

On the application of the plaintiff and pursuant to statute, one of the District Judges of the United States District Court for the Southern District of New York convened the Statutory Three Judge Court to hear the plaintiff's case wherein the plaintiff prayed that the Court enjoin, annul and set aside the orders of the Interstate Commerce Commission dated July 8, 1947, and October 13, 1947, which complaint was directed against only that part of the order of July 8, 1947, which authorizes Adirondack to engage in passenger transportation between Paramus, New Jersey, on the south, and Monroe, New York, on the north. The complaint was duly served on the United States of America and the Interstate Commerce Commission, which sovereign and commission duly appeared and objected to the relief requested. Adirondack, by the statutes made and provided and by order of the District Court, was allowed to intervene in said cause as a defendant-intervenor. The cause duly came on for a full and final hearing on the merits

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before the Three Judge Court. On the motion of the attorneys for the plaintiff, the said Court annulled, enjoined and set aside that portion of the order of the Interstate Commerce Commission made July 8, 1947, which authorized Adirondack to inaugurate short-haul and commuter operations between New York City, New York, on the one hand, and points south of Monroe, New York, and north of Paramus, New Jersey, on the other hand, and rendered its opinion and adopted as its findings of fact those findings of the Interstate Commerce Commission in its report and order of July 3, 1946, and set forth its conclusions of law in the opinion of the said Statutory Court annexed hereto. This appeal is prosecuted from the final decree or judgment made, filed and entered on the 28th day of February, 1949, which set aside and annulled the said portion of the order of the Interstate Commerce Commission dated July 8, 1947.

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final judgment or decree here in question.

Ziffrin, Inc. v. *United States of America, et al.*, 318 U. S. 73;

Howard Hall Co., Inc. v. *United States of America, et al.*, 315 U. S. 495;

United States of America, et al. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475;

United States of America, et al., v. *American Trucking Associations, Inc., et al.*, 310 U. S. 534;

United States of America, et al., v. *Maher*, doing business as Interstate Buses, 307 U. S. 148;

United States of America, et al., v. *Baltimore & Ohio Railroad Co., et al.*, 293 U. S. 454.

(E) Statement of the Grounds upon Which It Is Contended That the Questions Involved Herein Are Substantial

It is respectfully submitted that the legal theories adopted and applied by the District Court to the circumstances of the instant case, if permitted to rest undisturbed would wreak havoc with the established law governing the actions of the Interstate Commerce Commission in connection with its functions as an expert body as well as with the scope of judicial review controlling the actions of the District Courts in their review of the orders of the Interstate Commerce Commission.

The District Court in the within appeal took the position in Adirondack's proceeding pursuant to Section 207, Interstate Commerce Act, Part II, that it was necessary for it to prove the usual issue of public convenience and necessity. With such theory there can be no quarrel. However, the District Court required that the element of "necessity" must include a showing that the present facilities of the plaintiff are inadequate. In short, before Adirondack could be granted the right to operate in the disputed segment of its route heretofore mutually served by Adirondack and the plaintiff, the Interstate Commerce Commission, according to the District Court, was required to find that the facilities of the plaintiff were inadequate before Adirondack would be permitted to compete with the plaintiff on the segment of route here in question. It is submitted that such theory or proposition is contradictory to the established law. Appellant, Adirondack, understands the law to be as follows:

The issue of public convenience and necessity is a matter particularly requiring the exercise of the Interstate Commerce Commission's expert judgment in the field of transportation.

United States of America v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

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In examining this administrative discretion, there are no specifications or considerations by which the Interstate Commerce Commission is to be governed.

Texas & Pacific Railway Company v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266, 273.

Such proposition was recently affirmed in *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65, when the Supreme Court said:

> "• • • The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and necessity. Cf. Powell *v.* United States, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission. Cf. McLean Trucking Co. *v.* United States, 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances • • •."

It has been expressly held that the Interstate Commerce Commission may authorize new service for the very purpose of providing the public with the benefits of competition.

Virginia Stage Lines v. *United States of America*, 48 F. Supp. 79, 81.

In *Chesapeake & Ohio R. Co.* v. *United States of America*, 283 U. S. 35, 38, 41-43, it was contended that the Interstate Commerce Commission is not authorized by the Act to grant a certificate of convenience and necessity for new construction upon a naked finding that competition between carriers and competitive service to shippers will result, but the Supreme Court ruled that the Interstate Commerce Commission had the power and right to "authorize construction of new lines to provide for shippers such competitive service as it should find to be convenient and necessary in the public interest."

This Court's attention is directed to the last paragraph of the last page of the opinion dated April 15, 1948, of the District Court herein, when it summarized its reasons for setting aside and enjoining the Commission's order dated July 8, 1947. In short, the Court limits the power of the Interstate Commerce Commission to authorize Adirondack to compete in the disputed segment on two grounds as follows:

> (1) Showing that the facilities of the plaintiff are inadequate, or
>
> (2) That Adirondack's operation on the disputed segment must secure an improved service to the public.

It is submitted on the basis of the foregoing decisions of this Court that the first alternative was not a mandatory condition precedent to the granting of such additional service.

Another substantial issue is predicated on the alternative requirement of the District Court that the Interstate Commerce Commission must find that the public would receive an improved service by the authority granted to Adirondack. Appellant agrees with this theory of the Court, but states that the Court baldly disregarded the undeniable existence and presence of this identical showing and finding in the Commission's report made July 8, 1947. The Commission stated in its said report on page 43-44 infra as follows:

> "* * * To require applicant (Adirondack) to operate approximately 50 miles, one-half of the distance covered by the majority of its trips, without providing transportation to the public from and to New York City not only would appear unwarranted and arbitrary but would result in wasteful transportation and inconvenience to the public. When applicant's busses are leaving the New York City terminal, for example, prospec-

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tive travelers to points on the restricted segment would be required to wait for the later departure of protestant's busses traveling over substantially the same routes, and the same inconvenience would be suffered in the opposite direction from points on such segment to New York City. We think that the inconvenience to the public of the present restriction far outweighs any possible detrimental effect upon protestant which the modification sought by applicant might have. * * *"

"* * * Applicant has long transported passengers between New York City and many of the points south of Monroe. The modification sought by applicant would permit continuance of such service, increase travel facilities for the public, and, in our opinion, would permit more efficient operation which also would result in benefit to the public. * * *"

Note: Parentheses mine.

By such action on the part of the District Court, it has in effect improperly applied correct law, resulting in the usurpation of the Commission's function and deprived the plaintiff of a valuable property right without due process of law wholly in violation of and repugnant to the Fifth Amendment of the Constitution of the United States.

It is contended that both questions referred to herein are substantial in that they are of such character as to affect motor carriers not only through the states in which Adirondack operates, but throughout the United States.

Statement Respecting Opinions

The Court below delivered and filed its opinion in writing which contained its conclusions of law, and adopted as and for its findings of fact the findings of the Commission in its report and order of July 3, 1946, in connection with the entry of the final decree or judgment herein. Copies of the opinion of the District Court, the final decree filed and entered February 28, 1949, and the report and order of the Interstate

Commerce Commission of July 3, 1946, including the report and order of the said Commission of April 7, 1947, and order dated July 8, 1947, are reproduced, respectively, as appendices A, B, C, D and E, and are attached to this jurisdictional statement.

Respectfully submitted,

MARTIN J. KELLY, JR.,
Attorney for Appellant, Adirondack Transit Lines, Inc., Defendant-Intervenor.

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APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 44-326

HUDSON TRANSIT LINES, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

ADIRONDACK TRANSIT LINES, INC., *Defendant-Intervenor*

Action by Hudson Transit Lines, Inc., against the United States and the Interstate Commerce Commission to set aside orders of the Commission, wherein Adirondack Transit Lines, Inc., was granted leave to intervene.

James F. X. O'Brien, Esq., of Newark, N. J., for plaintiff.
Daniel H. Kunkel, Esq., of Washington, D. C., for Interstate Commerce Commission.
Edward Dumbauld, Esq., of Washington, D. C., for United States.
Martin J. Kelly, Jr., Esq., of New York, N. Y., for intervenor-defendant.

Before Swan, Circuit Judge, and Rifkind and Ryan, District Judges

SWAN, C. J.:

This is a suit to set aside an order of the Interstate Commerce Commission dated July 8, 1947 which authorizes the issuance of a certificate of public convenience and necessity to Adirondack Transit Lines, Inc. Adirondack is a motor carrier engaged in the transportation of passengers by motor bus over authorized routes between New York City and points in northern and central New York. The plaintiff, Hudson Transit Lines, is also a motor carrier engaged in the transportation of passengers by motor bus over authorized routes. From Paramus, N. J. to Monroe, N. Y., Hudson operates over the same route as does Adirondack. As

a competitor it has an interest which gives it standing to bring this suit. Alton R. Co. *v.* United States, 315 U. S. 15, 19.

The suit is brought pursuant to 28 U. S. C. A. §§41(28), and 43 to 48 and 49 U. S. C. A. §305(g). The court has jurisdiction. Pursuant to 28 U. S. C. A. §45a Adirondack was properly allowed to intervene as a defendant.

The Commission's order of July 8, 1947 which the suit seeks to set aside was entered in a proceeding by which Adirondack sought under 49 U. S. C. A. §307 an extension of its route between Weehawken, N. J. and New York City that would permit it to use the Lincoln Tunnel and to abandon operations via the West Shore—42nd Street Ferry. The order grants such permission but imposes a restriction on Adirondack's operations via the Tunnel, limiting it to transportation of passengers moving between New York City and points north of Paramus, N. J. This is a modification of an earlier order, dated July 3, 1946, in the same proceeding which restricted Adirondack to the transportation of traffic moving between New York City and points north of Monroe, N. Y. The later order was made upon the same record as the earlier, without any additional evidence, and Hudson contends that the Commission's removal of the restriction from Monroe to Paramus is (a) unsupported by necessary basic findings, (b) unsupported by substantial evidence, and (c) unlawfully discriminatory. By its brief, however, Hudson concedes that it will be satisfied if the northern limit of the restriction is set at the intersection of New York Highways 17 and 32 at Harriman, N. Y., which is a few miles south of Monroe.

The history of Adirondack's operations antedating the proceeding in which the order under attack was issued may be summarized as follows: On June 4, 1937 Adirondack received a "grandfather" certificate, pursuant to 49 U. S. C. A. §306, for its operations over described routes which led from New York City to Weehawken, N. J. and thence to Kingston, Saugerties, Saranac Lake and Massena, N. Y. Until the opening of the Lincoln Tunnel in December 1937 Adirondack used the ferry from Weehawken to cross the Hudson River. After the Tunnel was opened it used the Tunnel in the belief that its grandfather certificate author-

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ized such use. In Lincoln Tunnel Applications, 12 M. C. C. 184, 196, the Commission ruled that use of the Tunnel was such a change in operations as to require a certificate of public convenience and necessity. Following this ruling, the Commission held that Adirondack's use of the Tunnel was unlawful; and its decision was sustained in Adirondack Transit Lines *v.* United States, 59 F. Supp. 503, aff'd, 324 U. S. 824. Thereafter Adirondack continued its use of the Tunnel under temporary authority granted by the Commission. Thus since the opening of the Tunnel Adirondack has not operated by way of the Ferry.

On July 13, 1944, Adirondack initiated the proceeding here involved by filing an application for a certificate of public convenience and necessity, in order to obtain permission to substitute the Tunnel route for the Ferry route. After a hearing the Examiner recommended issuance to Adirondack of a certificate restricted to the carriage of traffic destined to or from points north of the New York-New Jersey state line, which is 31 miles from the city of New York. Both Adirondack and various protestants including Hudson filed exceptions as to the nature and extent of the restriction. The Examiner's recommendation was modified by the Commission, Division 5, which by order of July 3, 1946, set the restriction at Monroe, N. Y., a point 46 miles from the city. The Commission as a whole approved this decision on January 6, 1947, by denying Adirondack's petition for reconsideration. Thereafter, upon a second petition for reconsideration, the Commission on April 7, 1947, reopened the proceeding and sent it back to Division 5 to determine upon the existing record whether and to what extent the restriction upon Adirondack's service should be modified. On July 8, 1947, Division 5 issued its report and order modifying its former order of July 3, 1946, so as to set the northerly restrictive point at Paramus, N. J. instead of Monroe, N. Y. This point is approximately 17 miles from New York City. The protestant Hudson moved for reconsideration and further hearing, but this was denied by the Commission by order dated October 13, 1947.

Hudson's suit seeks to set aside both the order of July 8th and the order of October 13th, which in effect affirmed the July 8th order. Its complaint is directed against only

that part of the order of July 8th which authorizes Adirondack to engage in passenger transportation between New York City and points in New Jersey and New York on its authorized route between Paramus, N. J. on the south and Monroe, N. Y. on the north. Over this segment of the route Adirondack's service is competitive with Hudson's short-haul and commuter service. While the competition will not be serious so long as Adirondack continues, as it has in the past, to accept passengers to or from points within this segment only when there are vacant seats in its long-haul busses, Hudson fears that under the certificate authorized by the order of July 8th Adirondack will inaugurate a short-haul and commuter service that will destroy the value of Hudson's same type of service which has been built up at large expense during the last ten years and has only recently become profitable.

The plaintiff does not question so much of the order of July 8, 1947 as will permit Adirondack to route its long-haul busses through the Lincoln Tunnel. But the order will also enable Adirondack to inaugurate a short-haul and commuter service via the tunnel between New York City, on the one hand, and, on the other hand, points intermediate between and inclusive of Monroe, N. Y. and Paramus, N. J. This will be a new service. The issue for our decision is whether the Commission's ultimate finding that the public convenience and necessity require such service is supported by adequate subordinate findings and by substantial evidence. See Florida *v.* United States, 282 U. S. 194, 215; United States *v.* Carolina Carriers Corp., 315 U. S. 475, 488-9; United States *v.* Pierce Auto Lines, 327 U. S. 515, 533; Inland Motor Freight *v.* United States, 60 F. Supp. 520, 524-5 (E. D. Wash.).

The case is unusual in that upon the same record the Commission has reached two contradictory conclusions. Its report and order of July 3, 1946 found that public convenience and necessity did not require such service, since it set the northern limit of the restricted segment at Monroe. The report notes that Adirondack, although operating through the tunnel since December, 1937, has catered chiefly to passengers requiring long-haul operations between New York City and authorized northern and mid-New York

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points; that on the basis of 4,039 trips during April, July, October and December, 1944, Adirondack averaged less than 1.5 passengers per trip between Monroe and Weehawken including intermediate points, on the one hand, and New York City on the other. It says that "No public witnesses testified nor has any inadequacy of service by protestants between the foregoing points via the Tunnel been established," and, "considering the evidence as a whole," the Commission states its opinion that the application should be granted, "subject to the restriction that operation over the proposed route shall be limited to the transportation of traffic moving to or from points in New York north of Monroe on applicant's presently authorized routes." The above findings are supported by the evidence and fully justified the limitation imposed by the order of July 3, 1946. Without changing the subordinate basic findings which support the ultimate finding of lack of public convenience and necessity for unrestricted operation by Adirondack south of Monroe, the report and order of July 8, 1947 reversed that conclusion and substitutes the ultimate finding that unrestricted operation is required on so much of the route as lies south of Monroe and north of Paramus.

No clear reasons for such reversal are stated in the July 8th report. After referring to the earlier report and to the order of April 7, 1947 reopening the proceeding for reconsideration on the record as made, the report recites that "Facts set forth in the prior report will be restated only to the extent necessary to the disposal of the issue here presented." It then states what Adirondack "contends", namely, that the restrictive condition of the 1946 order is too severe, is unwarranted by the evidence, and will result in the loss of substantial revenue to it at points it has served for many years; but the report makes no direct finding as to the merit of such contentions. It next notes that Adirondack urges that the segment of its route between Paramus and Monroe is beyond the highly competitive, so-called "mass transportation", area and is rather sparcely settled, and it finds that the evidence supports this contention. What inference the Commission draws from this finding the report does not state. The natural inference would seem to be that there was a greater need for Adiron-

dack's short-haul service south of Paramus than north of it; yet the restriction is lifted only as to the segment of the route north of Paramus. The report then finds that Hudson would be the only bus operator providing substantial service between New York City and the points on the described segment throughout the greater portion of the year; but it makes no finding that Hudson's service would be inadequate, nor does it allude to the finding of the earlier report that no inadequacy of service had been established. It does not even suggest that an operation competitive with Hudson's would secure better service for the public.

The closest approach to stating reasons for the modification of the restrictions contained in the following paragraph of the report.

> "Although applicant's routes are rather extensive, the largest number of its bus trips have been and are between New York City and Kingston, N. Y., a distance of approximately 100 miles. Applicant operates from and to the same terminal in New York City as does Hudson Transit. To require applicant to operate approximately 50 miles, one-half of the distance covered by the majority of its trips, without providing transportation to the public from and to New York City not only would appear unwarranted and arbitrary but would result in wasteful transportation and inconvenience to the public. When applicant's busses are leaving the New York City terminal, for example, prospective travelers to points on the restricted segment would be required to wait for the later departure of protestant's busses traveling over substantially the same routes, and the same inconvenience would be suffered in the opposite direction from points on such segment to New York City. We think that the inconvenience to the public of the present restriction far outweighs any possible detrimental effect upon protestant which the modification sought by applicant might have. Such effect in any event should not be severe. Applicant has long transported passengers between New York City and many of the points south of Monroe. The modification sought by applicant would permit

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continuance of such service, increase travel facilities for the public, and, in our opinion, would permit more efficient operation which also would result in benefit to the public. While Hudson Transit fears that the sought modification would deprive it of substantial traffic and revenue, its fears are conjectural and unsupported by the evidence."

As noted in the earlier report, Adirondack carried on its long-haul busses an average of only 1.5 passengers per trip to and from the disputed segment of the route. Indeed, since Hudson is willing to have the northern point of the restricted segment fixed at Harriman, it argues that the passengers bound to and from Monroe should be excluded from the computation, and this would reduce the average per trip to less than one passenger. Hence the inconvenience to the public of having to wait for a Hudson bus can scarcely be thought substantial enough to establish a public need for additional service. Nor would it seem "wasteful transportation" for Adirondack's long-haul busses to operate through the restricted area with only 1.5, or less than one if the restriction stops at Harriman, vacant seats per trip. If it appears to the Commission "unwarranted and arbitrary" to prevent Adirondack from operating in the disputed segment in the same manner as it has heretofore operated, this could be accomplished by so wording the restriction as to permit the carriage of passengers to and from all disputed segment on long-haul busses, that is, busses destined from New York to Kingston or points north thereof and busses destined to New York originating at Kingston or points north thereof. This is all Adirondack's previous practice has been. But the new certificate will permit it to inaugurate short-haul and commuter operations without any finding of public need for such service or any inadequacy in existing facilities. And the statement that Hudson's fears are conjectural and unsupported by the evidence is not sustainable. The evidence shows without contradiction that if such service should be inaugurated in competition with Hudson's service of that type, neither carrier would find it profitable.

The Commission has frequently held that under § 207 of the Act, 49 U. S. C. A. § 307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. Pan-American Bus Lines, Operation, 1 M. C. C. 190, 203; Bluenose Bus Co. Ltd., Common Carrier Application, 1 M. C. C. 173, 176; Richard L. Richards, Extension of Operations, 6 M. C. C. 80, 81; Ohio Transportation Co., Common Carrier Application, 29 M. C. C. 513, 520; Royal Cadillac Service, Inc., Common Carrier Application, 43 M. C. C. 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public "necessity." Inland Motor Freight *v.* United States, 60 F. Supp. 520, 524 (E. D. Wash.). See also I. C. C. *v.* Parker, 326 U. S. 60, 69-70 and dissenting opinion of Mr. Justice Douglas at p. 74. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. Chesapeake & O. Ry. Co. *v.* United States, 283 U. S. 35. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. I. C. C. *v.* Parker, supra. No such finding has here been made, nor is there any evidence to support such a finding.

It is true that evidence of past operations under color of right may be taken into consideration in determining the present or future public convenience and necessity. Crichton *v.* United States, 56 F. Supp. 876, 879 (S. D. N. Y.), aff'd, 323 U. S. 684; Inland Motor Freight *v.* United States, supra, 525. But as noted above the carriage by Adirondack of an average of 1.5 passengers per trip between the disputed segment and New York City (¾ of a passenger if Hudson's concession to Harriman is considered) can hardly be considered to be substantial enough to evidence a real need. "Substantial, as distinguished from incidental, sporadic, or infrequent service is required." United States *v.* Carolina Freight Carriers Corp., 315 U. S. 475, 480-1.

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So much of the order of July 8, 1947 as authorizes Adirondack to inaugurate short-haul and commuter operations south of Monroe and north of Paramus is not based on any finding that the existing service is inadequate, or that the newly authorized operation will secure to the public improved service, and conflicts with the finding in the Commission's report of July 3, 1946 that no inadequacy has been established. Therefore this portion of the order must be set aside and the cause remanded to the Commission for such action as it may deem appropriate and in accordance with this opinion. It is so ordered. We adopt as our findings of fact the findings of the Commission, Division 5, in its report and order of July 3, 1946. Our conclusions of law are stated in the foregoing opinion. Settle order on notice.

THOMAS W. SWAN.
SIMON H. RIFKIND.
SYLVESTER J. RYAN.

Dated: April 15, 1948.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 44-326

HUDSON TRANSIT LINES, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

ADIRONDACK TRANSIT LINES, INC., *Defendant-Intervenor*

Decree

This cause having been heard on final hearing and upon arguments and briefs of counsel for all parties to the proceedings, and the same having been heard and considered,

and the Court having filed its opinion, findings of fact and conclusions of law, in which the Court adopted as its findings of fact the findings of the Commission, Division 5, in its report and order of July 3, 1946, in the proceeding before the Commission here reviewed, and in which the Court found that the order of the Commission in said proceeding of July 8, 1947 was unsupported by substantial evidence, and was unsupported by necessary basic findings, to the extent that it modified and reversed the prior order of July 3, 1946 in said proceedings,

It is, thereupon, Ordered, Adjudged and Decreed that so much of the order of the Interstate Commerce Commission made July 8, 1947 in Docket No. MC 2835, Sub. No. 10, Application, Adirondack Transit Lines, Inc.—Extension—Lincoln Tunnel, and which was affirmed by subsequent order of the Interstate Commerce Commission dated October 13, 1947, as authorized Adirondack Transit Lines, Inc. to transport passengers in short haul service between New York City, New York, on the one hand, and points in New Jersey and New York, south of Monroe, New York, on the other hand, be, and the same is hereby annulled and set aside; provided that nothing herein shall be deemed to prevent the Interstate Commerce Commission from authorizing Adirondack Transit Lines, Inc. to transport passengers between New York City on the one hand, and points on its authorized route in New Jersey and New York, between a point 2,000 feet north of the intersection of New Jersey Highways 17 and 4 at Paramus, New Jersey, and the south village line of Monroe, New York, on the other, on buses which are destined from New York City, and which operate through to Kingston, New York, or points north thereof, and on buses destined to New York City, and which operate through to New York City from originating points at Kingston, New York, or points north thereof, and

It is further Ordered that the proceedings herein be remanded to the Interstate Commerce Commission for such

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action as may be proper, and in accordance with the opinion and order of this Court filed herein.

Dated: February 28, 1949.

THOMAS W. SWAN,
United States Circuit Judge.

SIMON H. RIFKIND,
United States District Judge.

SYLVESTER J. RYAN,
United States District Judge.

APPENDIX "C"

INTERSTATE COMMERCE COMMISSION

No. MC-2835 (Sub-No. 10)

ADIRONDACK TRANSIT LINES, INC., EXTENSION-LINCOLN TUNNEL

Submitted December 14, 1945. Decided July 3, 1946

Public convenience and necessity found to require an extension of operations by applicant as a common carrier by motor vehicle of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, between the junction of Hudson Boulevard East and Pershing Road in Weehawken, N. J., and New York, N. Y., over a regular route, and through the Lincoln Tunnel, serving no intermediate points, subject to certain restrictions. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Martin J. Kelly, Jr., for applicant.

Leland Taliaferro, James F. X. O'Brien, and Henry P. Goldstein for protestants.

John F. Finerty for intervener in opposition to the application.

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

Exceptions were filed by applicant and protestants to the recommended order of the examiner, and protestants replied to applicant's exceptions. Our conclusions differ slightly from those recommended.

By application filed July 13, 1944, as amended, Adirondack Transit Lines, Inc., of Kingston, N. Y., seeks a certificate of public convenience and necessity authorizing an extension of operation as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers and their baggage, and of express, mail, and newspapers in the same vehicle with passengers, between junction Hudson Boulevard East (hereinafter called Boulevard East), and Pershing Road in Weehawken, N. J., and New York, N. Y., as follows: From junction Boulevard East and Pershing Road, over Boulevard East to the entrance of the Lincoln Tunnel (hereinafter called the Tunnel), and thence through the Tunnel to New York City, and return through the Tunnel to the elevated highway, thence over the elevated highway to Boulevard East, and thence over Boulevard East to junction Pershing Road, serving all intermediate points, except that no passengers will be transported between New York City, on the one hand, and, on the other, points in New Jersey on the proposed route between junction Boulevard East and Pershing Road and the Tunnel. A number of motor carriers oppose the application.

Under certificates in various applications applicant is authorized to transport, over regular routes, passengers and their baggage, and express and newspapers in the same vehicle with passengers, between New York City and various New Jersey and New York points beginning at Weehawken and ending at Massena, N. Y., more specifically as described in appendix A.

The certificate issued in No. MC-2835, the "grandfather" application, authorizes applicant to cross the Hudson River between Weehawken and New York City without specifying the means of crossing. On June 1, 1935, applicant, as were

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other motor carriers, was using the West Shore-42nd Street Ferry, hereinafter called the Ferry. With the opening of the Tunnel, however, on December 22, 1937, it ceased operations by the Ferry and commenced operations through the Tunnel under the impression that its "grandfather" certificate authorized such an operation. In *Manhattan Coach Lines, Inc.*, v. *Adirondack Transit Lines*, 42 M. C. C. 123 and 43 M. C. C. 477, the Commission interpreted the foregoing certificate as authorizing only those operations conducted on June 1, 1935, and applicant was ordered, among other things, to cease operations through the Tunnel. Such interpretation was affirmed by a federal court in *Adirondack Transit Lines, Inc.* v. *U. S.*, 59 Fed. Sup. 503. As a result of such interpretation, and before the effective date of the cease and desist order, applicant filed an application with the Commission for authority under section 204(f) of the Interstate Commerce Act. By order of August 1, 1944, in No. MC-2835 (Sub-No. 11)W, applicant was authorized to operate over the route for which authority is sought herein, serving all intermediate points, subject to the restriction that service over such route in connection with traffic originating in New Jersey and destined to New York, N. Y., or originating in New York, N. Y., and destined to points in New Jersey may be performed only on applicant's intercity schedules which neither originate nor terminate at a point in New Jersey. Thus, since the opening of the Tunnel applicant has operated through it continuously and has not operated by way of the Ferry.

Applicant owns and operates 50 busses and maintains garages and terminals at Kingston and Malone, N. Y., and a garage at Lake George, N. Y. It is fit and able, financially and otherwise, to perform properly the proposed operation.

No public witnesses appeared in support of the application but various employees of applicant and a traffic expert testified as to the need for the proposed service. Under its present authority applicant operates northbound seven schedules daily out of New York City with one additional schedule on Friday, Saturday, and Sunday. Southbound it operates into New York City seven schedules daily and an additional schedule on Sunday, Monday, and Friday. Two

of the daily northbound schedules terminate at Massena, (389 miles from New York City) one at Saranac Lake, N. Y., (305 miles from New York City), two at Saugerties, N. Y. (111 miles from New York City), and two at Kingston (100 miles from New York City); and the additional schedule on Friday, Saturday, and Sunday terminates at Kingston. Similarly, southbound two daily schedules originate at Massena, one at Saranac Lake, two at Saugerties, and three at Kingston, including the additional schedule on Sunday, Monday, and Friday which originates there. The earliest daily departure from New York City is 7:30 a.m., and the latest 11:45 p.m., whereas the earliest daily arrival is 6 a.m., and the latest 11:30 p.m. On each schedule, as the traffic demands, additional sections may be added. At times the additional northbound sections are terminated at Walden, and Wallkill, N. Y., (68 and 72 miles, respectively, from New York City), and infrequently, if ever, at Southfield (39 miles from New York City). During April, July, October, and December 1944, applicant operated 771, 1713, 819, and 736 bus-trips, respectively, into and out of New York City; and during the same months transported 9,777, 24,931, 10,961, and 9,304 passengers, respectively, from New York City and 8,103, 21,352, 10,348, and 7,411 passengers, respectively, to New York City.

By operating through the Tunnel instead of by Ferry, applicant is enabled to reduce its operating time a minimum of 15 minutes to and from New York City. Such saving in time is considerably greater during inclement weather which causes Ferry delay en route and also in loading and unloading. The road leading from the intersection of Boulevard East and Pershing Road to the Ferry is narrow and winds down a cliff, and numerous accidents have occurred thereon. By contrast, Boulevard East which extends to the Tunnel, is 75 feet wide with only slight grades. By operating through the Tunnel in lieu of by the Ferry, applicant will be able to render a more expeditious and safer service for the public now served by it. No evidence was submitted showing a need for service at intermediate points on the proposed route.

Protestants Westwood Transportation Company and Westwood Transportation Lines, Inc., (hereinafter called

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Westwood) operate an integrated service over the same routes; and protestants Manhattan Coach Line, Inc., and Manhattan Transit Company (hereinafter called Manhattan) do likewise. Under appropriate authority, Westwood and Manhattan operate over the same streets over which applicant operates and proposes to operate between the entrance of the Tunnel and the intersection of Broad and Grand Avenues in Ridgefield. From that intersection they operate over Broad Avenue and applicant operates over Grand Avenue. Their operations meet again at the intersection of Broad Avenue and New Jersey Highway 6. From the last named intersection Westwood and applicant both operate over New Jersey Highway 6 to Hille Place in Ridgefield Park, N. J., and Manhattan and applicant over New Jersey Highway 6 to Hudson Street in Hackensack, N. J. Manhattan serves no additional points in common with applicant; but the lines of Westwood and applicant again meet at the Municipal Terminal in Hackensack and at the intersection of Central Avenue and New Jersey Highway 17 in Rochelle Park, N. J. Between Ridgefield Park and New York City where their routes duplicate, Westwood and Manhattan render a coordinated service through the Tunnel. Generally, each maintains a base schedule of 15 minutes between busses in non-rush hours, with 2 to 3 minutes between busses during rush hours. Service is available over both lines 24 hours of the day, and additional trips are added as the traffic demands. Manhattan owns and operates 47 busses and Westwood owns and operates 38 busses.

The route of protestant Orange & Black Bus Lines, Inc., extends between New York City and Fort Lee through the Tunnel, but intersects with applicant's present route only at the junction of Anderson and Fairview Avenues in Fairview, N. J., at which point it picks up or discharges a substantial amount of passengers. It operates 37 leased and owned busses and operates on a 15-minute base schedule with additional trips during rush hours and as needed.

Protestant, Inter City Transportation Co., Inc., under appropriate authority, operates, among other points, between Midland Park, N. J., and New York City through the Tunnel. It and its commonly controlled affiliate, New Jer-

sey-New York Transit Co., Inc., own and operate 117 busses which are used over all of their routes. Inter City's operations intersect applicant's present route at the junction of Essex Street and Summit Avenue in Hackensack and at the intersection of Passaic Street and New Jersey Highway 17 in Rochelle Park. It renders a frequent daily service similar in character to that heretofore described as rendered by other protestants.

Mountain Transit Corporation, hereinafter called Mountain, operates between New York City and points north of Monroe, N. Y., and certain intermediate points in New Jersey and New York. During the summer it operates through the Tunnel and during the remainder of the year by way of the George Washington Bridge. Insofar as applicant is concerned, Mountain is competitive at Mahwah, N. J., and Hillburn, Sloatsburg, Tuxedo Park, Southfields, Harriman, and Monroe, N. Y. During the last week in June and in July, August, and September, Mountain operates six schedules daily in each direction between Monroe and New York City with additional schedules on Saturday, Sunday, and Monday, southbound, and Friday and Saturday, northbound. During the remainder of the year only two schedules daily are rendered with an additional one on Sundays and holidays southbound and Fridays northbound.

Hudson Transit Lines, Inc., hereinafter called Hudson Transit, operates as a common carrier by motor vehicle, in interstate or foreign commerce, between New York, N. Y., and Binghamton and Kingston, N. Y., and Forest City, Pa. It is opposing the instant application to protect its so-called short haul operations between Middletown, N. Y., and New York City via Monroe and Suffern, N. Y., and Paramus, N. J., and between Newburgh, N. Y., and New York City, with special stress on the competitive effect of the proposal on its operations between New York City and Monroe, N. Y., inclusive, via the Tunnel route. Its Middletown and Newburgh routes traverse the same highways between New York City and the junction of New York Highways 17 and 32, at Monroe. The routes of Hudson Transit and applicant both pass through the Tunnel, part at Weehawken, and meet again at Essex Street and New Jersey Highway 17 in Maywood and continue over the same highways through Para-

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mus, Hohokus, Ramsey, and Mahwah, N. J., and Suffern, Ramapo, Sloatsburg, Tuxedo Park, Southfields and Harriman, N. Y., to Monroe where they again part, Hudson Transit proceeding to Middletown and applicant to Kingston and points north.

Hudson Transit owns and operates 49 busses and, on the hearing date, had 30 more on order. It maintains terminals or ticket offices in New York City, Hackensack, Paramus, Upper Saddle River, Hohokus, Mahwah, and Ramsey, N. J., and Goshen, Harriman, Middletown, Newburgh, Ramapo, Sloatsburg, Southfields, and Suffern, N. Y. Eighteen schedules leave New York City daily and approximately 18 schedules arrive in Hudson Transit's long-haul operations. In its short-haul operations northbound from New York City, approximately 15 schedules serve points between Paramus and Suffern, inclusive, 11 serve points north of Suffern to and including Harriman, and nine serve points north of Harriman to and including Monroe. Southbound daily ten schedules serve Monroe and points between Monroe and Harriman, 14 serve Harriman and points south thereof to and including Paramus. Additional schedules are provided on Saturdays, Sundays, and holidays and additional sections are added daily as the traffic demands. The service afforded is intended as a commuter service. Three schedules arrive in New York City between 8 a.m. and 9 a.m., inclusive, and of the 15 outgoing schedules, ten leave New York City between 4:30 p.m. and 10:30 p.m., inclusive. During the quarter ending March 31, 1945, Hudson Transit transported between New York City, on the one hand, and, on the other, points in New Jersey between the junction of New Jersey Highways 4 and 17 and the New York-New Jersey State line, 30,115 passengers, and during the same period it transported between New York City and New York points on the Suffern and Middletown Division, 70,501 passengers, practically all of whom are said to have originated or terminated at points between Suffern and Monroe, inclusive.

The examiner, in his report and recommended order, found that public convenience and necessity require the proposed operation, "with no service at intermediate points, and subject to the condition that service over this route (through the Tunnel) shall be restricted to the transporta-

tion of traffic moving between New York City, on the one hand, and, on the other, points in New York on applicant's authorized routes." No one challenges the recommended grant insofar as it involves authority to use the proposed route via the Tunnel in connection with applicant's now-authorized service in New York, generally north of Monroe. Specifically, the exceptions are directed to and raise a question as to the nature and extent of the restriction to be imposed in connection with the use of the Tunnel route to or from Monroe and intermediate points south thereof.

In its exceptions, applicant contends that, in view of the fact that it now is authorized to serve all intermediate points on its Ferry route, that the authority sought herein should be granted without restriction as to service at points on the Ferry route. It further asserts that if a restriction is deemed necessary, it should be imposed only with respect to that portion of its now-authorized route south of Maywood, N. J. Protestants, on the other hand, in order to protect their frequent mass-transportation or short-haul schedules, contend that if authority is granted it should be restricted to preclude applicant from transporting passengers via the Tunnel route between New York City, on the one hand, and, on the other, intermediate points on applicant's present routes north thereof and extending to a point 2,000 feet north of the intersection of New York Highways 17 and 208 in Monroe.

Stated somewhat differently, applicant's contention, in substance, is that since the proposed Tunnel route represents a changed route which may be tacked at Weehawken to its now-authorized regular-route operations in New Jersey and New York, consideration of the effect of the proposed route on its present operations and those of its competitors is without relevance and can afford no basis for a restriction of its certificated operations north of Weehawken. With this contention, we do not agree. We have frequently found that a change from a ferry to a tunnel route in the territory in question, with a concomitant saving in operating time, is usually also attended by a substantial change in the local riding habits of the public which may materially affect the competitive situation and, for this reason, requires a showing of public convenience and neces-

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sity. See *Lincoln Tunnel Applications*, 12 M. C. C. 184, 196. In such cases, where the evidence so warranted, we have also imposed appropriate restrictions on previously authorized operations in conjunction with the use of the tunnel route. Compare *Pennsylvania Greyhound Lines, Inc., Lincoln Tunnel Route*, 30 M. C. C. 373, and *Central Greyhound, Inc., Extension—Lincoln Tunnel*, 42 M. C. C. 851.

Protestants are apprehensive that if the application is granted without restriction, applicant will institute frequent short-haul schedules south of Monroe, involving a type of service not heretofore rendered by it to any significant degree, with equipment now idle due to the cessation of war traffic and thereby divert substantial traffic from them to such extent as to render their operations unprofitable. As seen, protestants, in the main, have specialized in short-haul and mass passenger transportation operation, and have inaugurated frequent schedules via the Tunnel responsive to a public need for transportation between New York City and suburban points in New Jersey and New York generally within approximately 50 miles of New York City. Applicant, on the other hand, although operating through the Tunnel since December 1937, has catered chiefly to passengers requiring long-haul transportation between New York City and authorized northern and mid-New York points. For example, as disclosed in appendix B, in contrast to its more substantial operations to or from points in New York north of Monroe, it averaged on the basis of 4,039 trips to or from New York during April, July, October, and December, 1944, less than 1.5 passenger per trip in service between Monroe and Weehawken, including intermediate points, on the one hand, and New York City, on the other. As heretofore indicated, no public witnesses testified nor has any inadequacy of service by protestants between the foregoing points via the Tunnel been established. Considering the evidence as a whole, we are of the opinion that the application should be granted, subject to the restriction that operation over the proposed route shall be limited to the transportation of traffic moving to or from points in New York north of Monroe on applicant's presently authorized routes.

Applicant proposes to permanently abandon operations between Weehawken and New York City by way of the Ferry upon the granting of the instant application. In order that the authority granted herein may be properly joined with applicant's present authority in No. MC-2835, the issuance of a certificate herein will be conditioned upon receipt of a written request from applicant requesting modification of the route between Saranac Lake, N. Y., and New York City set forth in its certificate in No. MC-2835 so as to delete therefrom the words "Weehawken, N. J. and thence across the Hudson River to New York," and substitute in lieu thereof the words "the junction of Hudson Boulevard East and Pershing Road." The appropriate change in the heading of such route will be made at the time of the issuance of a revised certificate.

We find that the present and future public convenience and necessity require an extension of operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, between the junction of Hudson Boulevard East and Pershing Road in Weehawken, N. J., and New York, N. Y., over a regular route, as follows: From junction of Hudson Boulevard East and Pershing Road, over Hudson Boulevard East to the entrance of the Lincoln Tunnel, and thence through the Lincoln Tunnel to New York City, and return through the Lincoln Tunnel to the elevated highway, thence over the elevated highway to Hudson Boulevard East, and thence over Hudson Boulevard East to junction thereof with Pershing Road, serving no intermediate points, subject to the condition that operation over this route shall be restricted to the transportation of traffic moving between New York City, on the one hand, and, on the other, points in New York north of Monroe, N. Y., on applicant's authorized routes; that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the Interstate Commerce Act and the rules and regulations thereunder; that upon receipt from applicant of a written request for modification of its certificate in No. MC-2835 to the extent hereinbefore described, an appropriate cer-

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tificate should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the Interstate Commerce Act and with our rules and regulations thereunder, and with the above specified condition, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

LEE, *Commissioner*, concurring in part:

I agree with this report, except that I would not restrict operations over the proposed route to the transportation of traffic moving between New York City, on the one hand, and on the other, points in New York north of Monroe, N. Y., on applicant's authorized routes. Applicant has a "grandfather" certificate authorizing it to serve all intermediate points on its route south of Monroe in operations via the Ferry. Since December 22, 1937, when the Tunnel was opened to vehicular traffic, it has used the proposed route in serving such points, either under claim of right or under temporary authority. The issuance of permanent authority to continue this service, therefore, would not change the competitive situation which has existed since prior to June 1, 1935. In view of this, imposition of the above-described restriction is not justified.

I. C. C. APPENDIX A

Applicant's Present Authority to Transport Passengers and Their Baggage, and of Express and Newspapers [1]— *No. MC-2835*

Between Saranac Lake, N. Y., and New York, N. Y.:

From Saranac Lake over New York Highway 86 to Lake Placid, N. Y., thence over New York Highway 86A to Keene, N. Y., thence over New York Highway 9N to Elizabethtown, N. Y., thence over U. S. Highway 9 to Albany, N. Y., thence over U. S. Highway 9W to

[1] Applicant is authorized to transport mail over all routes except those set forth in No. MC-2835.

Kingston, N. Y., thence over New York Highway 32, through New Paltz, to Modena, N. Y., thence over U. S. Highway 44 to Ireland Corners, N. Y., thence over New York Highway 208 to Monroe, N. Y., thence over New York Highway 17 to the New York-New Jersey State line, thence over unnumbered roads through Ramsey, N. J., to junction New Jersey Highway 2,[2] thence over New Jersey Highway 2 to junction U. S. Highway 46, thence over U. S. Highway 46 to junction New Jersey Highway S5, thence over New Jersey Highway S5, New Jersey Highway 1, and unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York, and return over the same route.

Alternate routes: Between New Paltz and Ireland Corners over New York Highway 208; and between the junction of New York Highways 17 and 339 and the New York-New Jersey State line over New York Highway 339.

Between Saugerties, N. Y., and Oneonta, N. Y.:

From Saugerties over New York Highways 32 to Palenville, thence over New York Highway 23A to junction New York Highway 296, thence over New York Highway 296 to junction New York Highway 23, and thence over New York Highway 23 to Oneonta, and return over the same route.

Between Lake George, N. Y., and Ticonderoga, N. Y.:

From Lake George over U. S. Highway 9 to junction New York Highway 47, thence over New York Highway 47 to Hague, N. Y., and thence over New York Highway 8 to Ticonderoga, and return over the same route.

All intermediate points on the above-specified routes.

No. MC-2835 (Sub-No. 1)

---

[2] New Jersey Highway 17.

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Between Underwood, N. Y., and Keene, N. Y.:

From Underwood over New York Highway 86A to Keene, and return over the same route.

Service is not authorized to or from intermediate points.

No. MC-2835 (Sub-No. 3)

Between Saranac Lake, N. Y. and Massena, N. Y.:

From Saranac Lake over New York Highway 86 to junction New York Highway 365, thence over New York Highway 365 to junction New York Highway 192, thence over New York Highway 192 to junction New York Highway 10, thence over New York Highway 10 to Malone, N. Y., and thence over New York Highway 37 to Massena, and return over the same route.

Service is authorized to and from all intermediate points.

No. MC-2835 (Sub-No. 4)

Between Ticonderoga and Fisher Hill, N. Y.:

From Ticonderoga over New York Highway 22 to Port Henry, N. Y., and thence over unnumbered highways via Moriah, Moriah Center, Witherbee, and Mineville, N. Y., to Fisher Hill.

No. MC-2835 (Sub-No. 5)

Between Port Henry and Witherbee, N. Y.:

From Port Henry over unnumbered highways via Mineville, N. Y., to Witherbee.

Return over these routes to the above-specified origin points.

Service is authorized to and from all intermediate points.

No. MC-2835 (Sub-No. 6)

Between Rooseveltown, N. Y., and the International Boundary of the United States and Canada:

From junction New York Highway 37 and the Toll Bridge Road in Rooseveltown, over the Toll Bridge Road to the boundary of the United States and Canada, and return over the same route.

Service is not authorized to or from the intermediate points.

No. MC-2835 (Sub-No. 7)

Between Saranac Lake, N. Y., and Gabriels, N. Y.:

From Saranac Lake, over New York Highway 3 to Bloomingdale, N. Y., thence over New York Highway 365 to junction New York Highway 192, thence over New York Highway 192 to Gabriels, and return over the same route.

Service is authorized to and from all intermediate points.

No. MC-2835 (Sub-No. 8)

Between Hensonville, N. Y., and Catskill, N. Y.:

From Hensonville over unnumbered highway to Brooksburg, N. Y., thence over New York Highway 23 to Catskill, and return over the same route.

No. MC-2835 (Sub-No. 9)

Between Brooksburg, N. Y., and junction New York Highway 23 and New York Highway 296, east of Wendham, N. Y.:

From Brooksburg over New York Highway 23 to junction New York Highway 296, and return over the same route.

Service is authorized to and from all intermediate points on the above routes except those between the westerly corporate village line of Catskill and the westerly corporate village line of Cairo, N. Y.

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ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its Office in Washington, D. C., on the 3rd day of July, A. D. 1946.

No. MC-2835 (Sub-No. 10)

ADIRONDACK TRANSIT LINES, INC., EXTENSION—LINCOLN TUNNEL

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

By the Commission, division 5.

W. B. BARTEL,
Secretary.

[SEAL.]

APPENDIX "D"

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of April, A. D. 1947.

No. MC 2835 Sub No. 10

ADIRONDACK TRANSIT LINES, INC., EXTENSION—LINCOLN TUNNEL, KINGSTON, NEW YORK

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Further petition of applicant for reconsideration, filed February 24, 1947;

(2) Motion of Hudson Transit Lines, Inc., protestant, filed March 6, 1947, to dismiss or deny applicant's petition;

(3) Reply and motion of Mountain Transit Corporation filed March 14, 1947, to dismiss further petition for reconsideration;

and good cause appearing therefor:

It is ordered, That said motions of protestants be, and they are hereby, overruled;

It is further ordered, That said proceeding be, and it is hereby, reopened for reconsideration, solely for the purpose of determining whether, and if so, to what extent, the condition limiting applicant's service to transportation of traffic moving between New York City, on the one hand, and, on the other, points in New York north of Monroe, N. Y., on applicant's authorized routes, should be modified;

And it is further ordered, That said proceeding be, and it is hereby, referred to Division 5 for consideration and disposition.

By the Commission.

W. P. Bartel,
Secretary.

[seal.]

APPENDIX "E"

INTERSTATE COMMERCE COMMISSION

No. MC-2835 (Sub-No. 10)

Adirondack Transit Lines, Inc., Extension—Lincoln Tunnel

Decided July 8, 1947

On reconsideration, findings in prior report, — M.C.C. —, modified so as to authorize applicant to transport traffic moving between New York, N. Y., on the one hand, and, on the other, Monroe, N. Y., and point on applicant's authorized

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routes located between a specified point in New Jersey, on New Jersey Highway 17 and Monroe, when also transported over the route authorized in the prior report.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON

BY DIVISION 5:

In the prior report herein, — M.C.C. —, decided July 3, 1946, we found that public convenience and necessity required an extension of operations by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, between the junction of Hudson Boulevard East and Pershing Road in Weehawken, N. J., and New York, N. Y., over a specified route through the Lincoln Tunnel, hereinafter called the Tunnel, serving no intermediate points, subject to the condition that operation over this route shall be restricted to the transportation of traffic moving between New York City, on the one hand, and, on the other, points in New York north of Monroe, N. Y., on applicants's other authorized routes.

Upon petition by applicant the Commission, by order entered April 7, 1947, reopened the proceeding for reconsideration, solely for the purpose of determining whether, and if so, to what extent, the condition limiting applicant's service as above described, should be modified. The Commission's order further referred the proceeding to Division 5 for consideration and disposition.

Facts set forth in the prior report will be restated only to the extent necessary to the disposal of the issue here presented. Applicant operates over somewhat extensive routes, as set forth in detail in Appendix A to the prior report. Its longest continuous route extends from New York City to Massena, N. Y., through New Jersey, a distance of 390 miles.

Applicant contends that the restrictive condition which would prohibit transportation of passengers between New

York City and Monroe, a point on its routes 46 miles north thereof, and intermediate points, is too severe, is unwarranted by the evidence, and will result in the loss of substantial revenue to it at points that applicant has served for many years. It urges that the condition be modified to authorize transportation of passengers between New York City and a point on its routes located on New Jersey Highway 17, in Paramus, N. J.,[3] 2,000 feet north of its intersection with New Jersey Highway 4 (approximately 17 miles from New York City) and points on its routes north thereof to and including Monroe; or in the event the Commission shall deem such modification not warranted, that the condition be modified to authorize transportation between New York City and points on its routes located on or north of the New Jersey-New York State line (approximately 31 miles from New York City).

Applicant contends that the first-named point is beyond the highly competitive, so-called mass transportation area, and that busses serving places between that point and Monroe operate under headways evidenced by printed schedules and transport passengers who, for the most part, purchase tickets at stations or depots before boarding the busses. The area traversed is described as rather sparsely settled. The evidence supports the first contention and reference to exhibits and other evidence shows that the area referred to is less densely populated than the territory south thereof traversed by applicant's routes. New Jersey Highway 4 is a four-lane, high-speed highway, leading from the George Washington Bridge, which crosses the Hudson River between New York and New Jersey, to Paterson, N. J., and is used by mass transportation bus lines.

Only two of the original several opposing carriers, namely Mountain Transit Corporation and Hudson Transit Lines, Inc., hereinafter called Hudson Transit, oppose the instant petition. Both filed motions to dismiss the petition which were overruled by the Commission in its order entered April 7, 1947, herein. The first-named carrier operates only two schedules daily, with one additional on week ends, be-

[3] Applicant's petition refers to this point as at, or near, Maywood. Applicant's Exhibit 8, a map, indicates it as in Paramus.

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tween New York City, on the one hand, and, on the other, places on the route traversed by applicant between the previously described point on New Jersey Highway 17 and Monroe, except during the summer months when it operates some additional schedules.

Hudson Transit operates as many as 59 trips daily, at times, which serve points on the disputed segment. However, for many years, a rather substantial number of passengers also have been transported by applicant between New York City and such points. In April, July, October, and December 1944, inclusive, chosen as representative months, applicant so transported a total of 5,098 passengers. The restriction imposed in the prior report would prevent applicant from transporting passengers between these points, and so far as this record shows Hudson Transit would be the only bus operator providing susbtantial service between New York City and the points on the described segment, throughout the greater portion of the year.

Although applicant's routes are rather extensive, the largest number of its bus trips have been and are between New York City and Kingston, N. Y., a distance of approximately 100 miles. Applicant operates from and to the same terminal in New York City as does Hudson Transit. To require applicant to operate approximately 50 miles, one-half of the distance covered by the majority of its trips, without providing transportation to the public from and to New York City not only would appear unwarranted and arbitrary but would result in wasteful transportation and inconvenience to the public. When applicant's busses are leaving the New York City terminal, for example, prospective travelers to points on the restricted segment would be required to wait for the later departure of protestant's busses traveling over substantially the same routes, and the same inconvenience would be suffered in the opposite direction from points on such segment to New York City. We think that the inconvenience to the public of the present restriction far outweighs any possible detrimental effect upon protestant which the modification sought by applicant might have. Such effect in any event should not be severe. Applicant has long transported passengers between New

York City and many of the points south of Monroe. The modification sought by applicant would permit continuance of such service, increase travel facilities for the public, and, in our opinion, would permit more efficient operation which also would result in benefit to the public. While Hudson Transit fears that the sought modification would deprive it of substantial traffic and revenue, its fears are conjectural and unsupported by the evidence. We conclude that the condition imposed in the prior report should be modified as requested by petitioner.

Upon reconsideration we find that the present and future public convenience and necessity require an extension of operations by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, between the junction of Hudson Boulevard East and Pershing Road in Weehawken, N. J., and New York, N. Y., over a regular route, as follows: From junction of Hudson Boulevard East and Pershing Road, over Hudson Boulevard East to the entrance of the Lincoln Tunnel, and thence through the Lincoln Tunnel to New York City, and return through the Lincoln Tunnel to the elevated highway, thence over the elevated highway to Hudson Boulevard East, and thence over Hudson Boulevard East to junction thereof with Pershing Road, serving no intermediate points, subject to the condition that operation over this route shall be restricted to the transportation of traffic moving betwen New York City, on the one hand, and, on the other, points north of a point on New Jersey Highway 17 located two thousand feet north of the intersection of this highway with New Jersey Highway 4, on applicant's authorized routes; that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the Interstate Commerce Act and the rules and regulations thereunder; that upon receipt from applicant of a written request for modification of its certificate in No. MC-2835 to the extent described in the prior report, an appropriate certificate should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the Interstate Commerce Act and

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with our rules and regulations thereunder, and with the above-specified condition, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, Held at its Office in Washington, D. C., on the 8th Day of July, A. D. 1947

No. MC-2835 (Sub-No. 10)

ADIRONDACK TRANSIT LINES, INC., EXTENSION—LINCOLN TUNNEL

It appearing, That on July 3, 1946, the Commission, division 5, made and filed its report and order in the above-entitled proceeding, granting applicant authority to conduct certain operations as a common carrier by motor vehicle, in interstate or foreign commerce, and denied the application in all other respects;

It further appearing, That on April 7, 1947, the Commission, by appropriate order, reopened said proceeding for reconsideration on the record as made and referred it to division 5 for consideration and disposition;

And it further appearing, That such reconsideration has been had, and that said division, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the aforesaid report and order of July 3, 1946, are hereby referred to and made a part hereof:

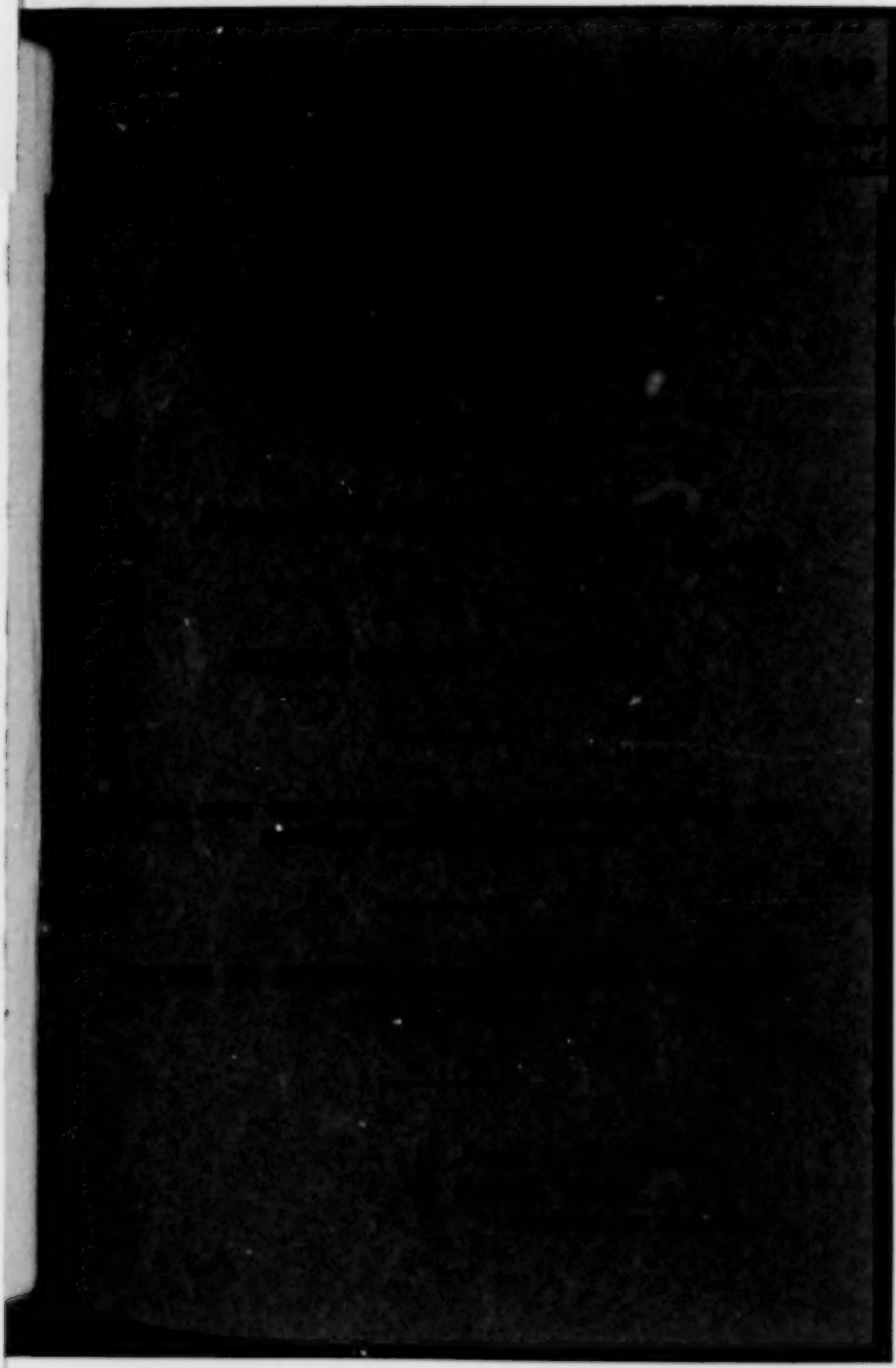
It is ordered, That the said order of July 3, 1946, be, and it is hereby, vacated and set aside.

It is further ordered, That except to the extent a certificate is granted in said report on reconsideration, the application be, and it is hereby, denied.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

[SEAL.]



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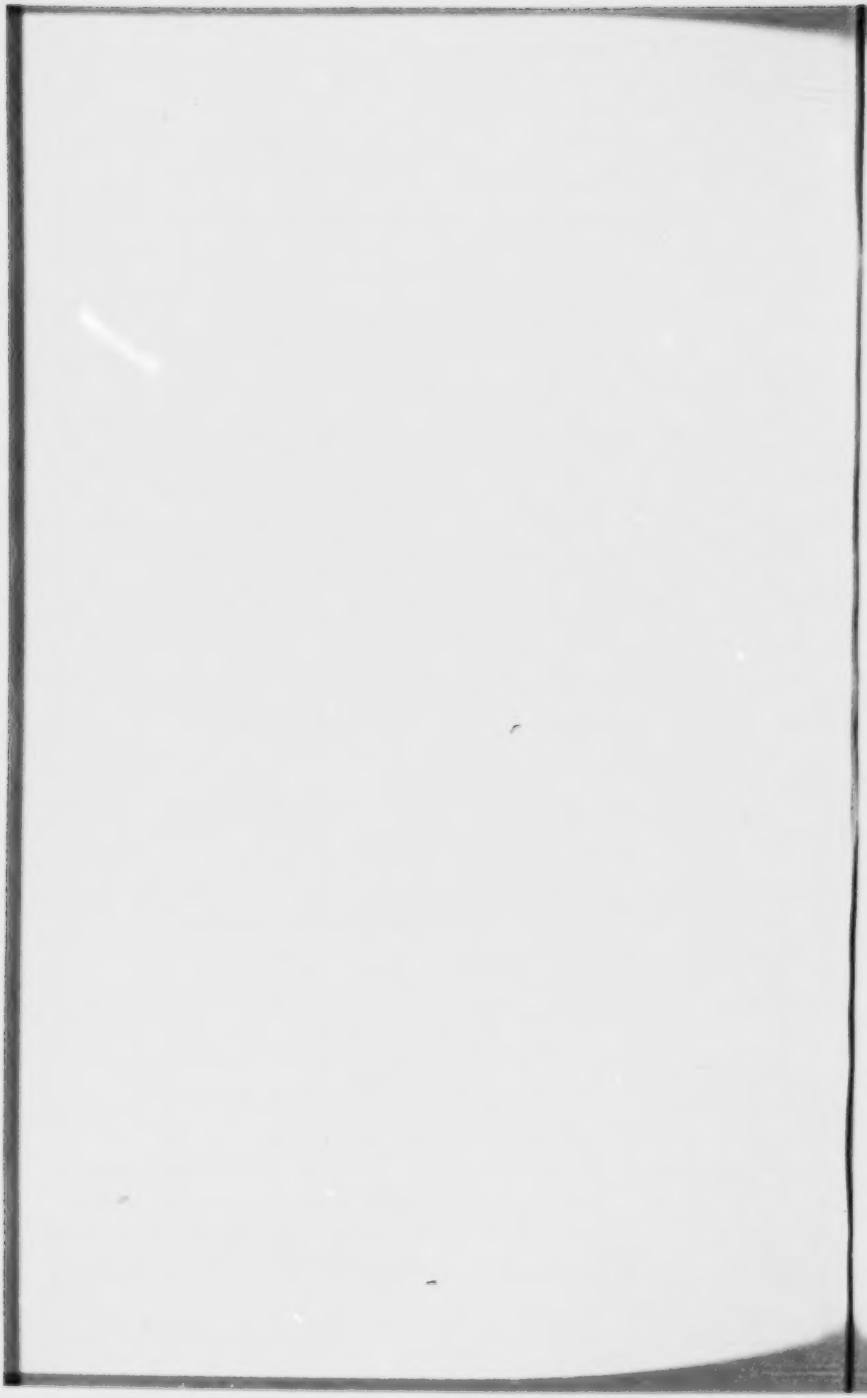

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants

MOTION TO AFFIRM

To Martin J. Kelly, Jr., Esq., Attorney for Defendant-Appellant, Adirondack Transit Lines, Inc., 70 Pine Street, Borough of Manhattan, City of New York, New York:

SIR:

Please take notice that the plaintiff-appellee, Hudson Transit Lines, Inc., does, pursuant to Rule 12, Paragraph 3, and pursuant to Rule 7, Paragraph 4, move to affirm the order and decree of the District Court in the above entitled cause upon the ground that the questions involved in the appeal to the Supreme Court of the United States are so unsubstantial as not to need further argument, and that the Statement as to Jurisdiction filed by the appellant does not disclose any adequate statement of grounds indicating

that the questions involved are substantial as required by Rule 12, Paragraph 1. In this motion, we shall rely upon the Statement Against Jurisdiction annexed hereto and filed herewith.

Dated: April 5, 1949.

Yours very truly,

SAMUEL WEISS,
Attorney for Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
535 Fifth Avenue,
Borough of Manhattan,
City of New York, N. Y., and
JAMES F. X. O'BRIEN,
Attorney for and of Counsel With
Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
17 Academy Street,
Newark 2, New Jersey.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants

STATEMENT AGAINST JURISDICTION

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Hudson Transit Lines, Inc., plaintiff-appellee herein, presents this Statement Against Jurisdiction, and respectfully submits that the questions involved in the instant appeal to the United States Supreme Court are so unsubstantial as not to need further argument.

Statement of Facts and Issue Involved

Defendant-appellant, Adirondack Transit Lines, raises the issue that the statutory Court below usurped the function of the Interstate Commerce Commission, and substituted its judgment and discretion for that of the Commission. The alleged issue is a fictitious one when considered in the light of the record facts and of the long

standing and fundamental decisions upon the law involved, rendered by both the Commission and the Courts in interpreting Section 207(a) of the Interstate Commerce Act, Part II, and more particularly that part thereof which interpreted the meaning of the words "public convenience and necessity" as contained in that Section.

The record facts are not conflicting. There is not and never has been any real factual disagreement between the parties upon the instant record.

The real issue raised by appellant is an unsubstantial one. Adirondack wants the Court to nullify the interpretation of the above mentioned words in Section 207 (a), to wit, "public convenience and necessity," as made by the Interstate Commerce Commission itself in a great many decisions, and by the Courts including this Court in and ever since the case of—

Texas & N. O. R. Co. v. *Northside Belt Ry. Co.*, 276 U. S. 475, at 479.

In that case, this Court held that the underlying purpose of requiring proof of public convenience and necessity is to prevent the institution of superfluous lines not required in the public interest,—obviously with the thought of ultimate protection of the traveling public itself. The Court there said that the use of the phrase "public convenience and necessity" in the above respect meant:

> "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

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When the Motor Carrier Act of 1935 was passed (it is now Part II of the Interstate Commerce Act), and the Interstate Commerce Commission was called upon to give judicial interpretation of the statutory requirement that a certificate be issued only on proof of public convenience and necessity, that Commission went to the decisions of the United States Supreme Court, and the decision in particular above mentioned, and found that Congress meant in the Motor Carrier Act by the use of the above mentioned words the same thing that had been meant in other utility regulatory legislation dealing therewith, and the Commission adopted as its interpretation of that portion of the Act of Congress the very meaning quoted by this Court in the case of *Texas* v. *Northside Belt Railway Co., supra.*

The Commission further said in its first principal decision involving motor carrier passenger lines above mentioned, to wit, the case of—

Pan-American Bus Lines, reported in 1 M. C. C. 190,

in addition to that portion above mentioned, the following (at page 202 of that Commission decision):

> "Section 207 (a) of the Motor Carrier Act is similar in general to section 1 (18) of the Interstate Commerce Act, above quoted, and both employ the expression 'public convenience and necessity.' The words 'convenience' and 'necessity' are used conjunctively, and we have found that they are not synonymous but must be given a separate and distinct meaning. Atlanta & St. A. B. Ry Co. Application, 71 I. C. C. 784."

There have been so many Commission decisions adopting and stating this same interpretation of those words in the Act that to merely list them would fill more pages than all of the matter herein contained. To mention a few of them,

we quote from the following Interstate Commerce Commission decisions:

Common Carrier Application of Bluenose Bus Co. Ltd., reported in 1 M. C. C. 173, 1 F. C. C. 8, and considered apparently at the same time as the *Pan-American* case, with the decisions being handed down only a few days apart. In that case, the Commission said, in denying the application (at p. 176):

> "The fact that in isolated cases the present operating bus line was unable to carry passengers on scheduled trips is not a sufficient basis to justify the Commission in granting a certificate of public convenience and necessity to another bus line, unless it be shown that the present bus lines, railroads, and steamship facilities are inadequate and inconvenient to the traveling public, and that the proposed facility will eliminate such inadequacy and inconvenience. No such showing was made by applicant herein."

In the case of Ohio Transportation Co.—Common Carrier Application, 29 M. C. C. 513, the Commission said (at p. 520):

> "Under the provisions of the act, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public proposed to be served, but also that it is a necessity on the part of such public. The latter element includes a showing that present facilities are inadequate and is aside from evidence of willingness and ability of the carrier to engage in interstate operations."

In the case of Craig Trucking Co.—Extension, reported in 46 M. C. C. 333, and 4 Federal Carriers Cases, 505, the Commission said:

> "No doubt a grant of authority to perform the proposed operations would be a convenience to applicant and to the shippers. This alone, however, is not suffi-

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cient to prove public convenience and necessity. The question of public convenience and necessity is in substance, whether the new service will serve a useful purpose responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant in a new operation or service without endangering or impairing the operations of existing carriers contrary to the public interest. Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the community. Before an additional carrier may be granted authority to compete with existing carriers, there should be convincing evidence that they are unable or unwilling to meet any reasonable demands that may be made upon them. No such showing has been made here."

In the case of Isadore Karzen, Contract Carrier Application, 31 M. C. C. 613, the Commission said (at pp. 615-616):

> "Applicant contends that protestants made no showing that existing service to the points in question is adequate to meet the shipper's needs. The burden of proof is upon applicant to establish affirmatively that the proposed operation is consistent with the public interest and the national transportation policy, and that such service cannot be rendered by existing carriers. We have repeatedly stated that existing carriers are entitled to handle the traffic available unless it is shown that there is a deficiency in the existing service."

In the case of Royal Cadillac Service, Inc., Common Carrier Application, reported in 43 M. C. C. 247, where the Commission said :

> "We have consistently held that where authority is sought to engage in motor carrier operations, *and to serve a portion of the public already served by other carriers,* the burden is upon applicant to show that such carriers are not rendering a type or character of service which satisfies the public need, and that the proposed

service will tend to correct or substantially improve that condition." (Italics ours.)

The pertinent section of the Act has a fixed, clear and definite interpretation of long standing.

Now, appellant wants this Court to reverse and nullify the whole body of law interpreting the Act, which gives to the motor carrier industry the legal yard stick by which public convenience and necessity may be proven in any given case. Adirondack wants this Court to say in effect that the Interstate Commerce Commission can give a different meaning to those words of Congress in each case before it, and can totally disregard the requirement of law enacted by Congress through the medium of just saying that in the Commission's discretion a certificate should be granted irrespective of the proof of record.

Adirondack wants all legal standards, which give meaning to the words of Congress according to the interpretation of both the Commission and the Courts, bodily thrown out the window. It claims that the Commission should be permitted, in passing upon an issue of public convenience and necessity, to disregard the record proof and to fall back on "its discretion," even in the absence of substantial evidence to support the findings and conclusion reached.

To do what appellant asks would be to change the statutory regulation of the Commission from a regulation by orderly process of law to an entirely arbitary regulation by men. Indeed, in argument before the Court below, when pressed on that issue, the respondents took the bold stand that the Commission had the right to act as it saw fit because it had discretion, and that there was no fixed meaning or legal standard by which its acts could be tested in passing upon the issue of public convenience and necessity.

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No substantial issue is presented by appellant—instead, appellant seeks to twist and turn wordings in other decisions of this Court to support its contention that the Commission can do what it pleases in any given case, and can exercise not only discretion but judgment without basis of support by substantial evidence and adequate findings. Appellant forgets that before discretion can be exercised, there must be at least the minimum of legal basis in the form of substantial evidence upon which to exercise that discretion.

Discretion is not a substitute for substantial evidence. If it were, there could be no such thing as an appeal to the Courts to reverse an administrative determination because that determination lacked the support of substantial evidence and adequate findings. If discretion were a substitute, as appellant contends, there would be no legal standards to use as a yard stick in determining whether or not the statutory requirements were met, and in this manner appeal to the courts would be made a futile waste of time and effort.

For the reasons above mentioned, we respectfully urge that the issue raised by appellant is fictitious in fact and unsubstantial in law. The determination of the Court below was based on the uncontradicted record facts and upon the law of Congress as it has long been interpreted by the Commission and the Courts.

The pertinent facts may be briefly summarized as follows:

Adirondack Transit Lines, Inc., filed an application under Section 207(a) of the Act, which required it to prove convenience and necessity, and the type, character and territory involved in that application brought into play the law as laid down by the Interstate Commerce Commission in the *Lincoln Tunnel* cases, reported in 12 M. C. C. 184.

The effect of this was to require the applicant to prove public convenience and necessity for its operation in the area which would be particularly affected by the change in approach to New York City through use of the Lincoln Tunnel. This meant that in the competitive short haul and commuter area served by Hudson Transit Lines, Inc., and other carriers, Adirondack had to prove the legal requirements making up public convenience and necessity as required by the Act, as it had been interpreted as above mentioned.

Adirondack offered no proof of public convenience and necessity except with relation to its long haul operations beyond Monroe, New York, and beyond the short haul and commuter area south of Monroe, where Hudson Transit Lines and other carriers were authorized to so serve the traveling public. Adirondack did place into evidence at the instance of Hudson Transit and other protestants a certain few records of passengers it had carried, and which it had brought to the hearing, and which obviously contained the most favorable extracts in relation to the period of carriage that Adirondack could find. These showed that even under the most favorable selection and interpretation, Adirondack Transit, in the stretch from Paramus, New Jersey, through New Jersey, and along that portion of New York up to Monroe, a distance of about twenty-eight miles, according to its own statistics, only carried an average of ¾ of one passenger per Adirondack trip between New York City and this entire twenty-eight mile stretch. The fact is that this stretch was mere passage territory for Adirondack for its operations from New York City to points beyond Monroe. Adirondack sought the right to an unlimited certificate along this stretch, foot by foot over the same highway certificated to Hudson Transit Lines, Inc. and other carriers, and where Hudson

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Transit Lines had spent large sums of money and ten years of hard effort to build short haul and commuter service from points along that stretch to and from New York City. The record shows that the number of trips operated by Hudson Transit were such that the number of passengers carried by Adirondack, as shown by its exhibits in the case, only amounted to about one Adirondack passenger for every four or five trips operated by Hudson Transit, or approximately 1/5 of one passenger per Hudson Transit trip.

The analysis of the figures in Appendix B of the Commission's decision, or of applicant's Exhibits 9 through 11C, also supports the record proof that Adirondack only carried those passengers because of the fact that it owned and controlled the Dixie Terminal in New York City, out of which both Adirondack and Hudson operate, and that when it had empty seats it put the passengers, who normally would be Hudson's passengers, into those empty seats, and that this carriage was occasional, sporadic, and unsubstantial in relation to the total numbers carried. The above analysis discloses that Adirondack carried them out of the terminal through that control, but made no provision for the return of those passengers who had to use Hudson Transit and the other carriers en route for their return trip. Adirondack made no provision for and failed to carry on the return trip 85 per cent of the passengers it carried from New York City to the disputed New Jersey points, and failed to carry back 93 per cent of the passengers carried from New York City to the disputed New York points south of Monroe. Adirondack's allegation of passengers carried indicates upon analysis that it could not even support the lesser proof required of a Grandfather operator, much less an operator seeking a new certificate upon proof of public convenience and necessity under Sec-

tion 207(a) of the Act. In dealing with this type of proof, this Court said in the case of—

> *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 (bottom p. 480 to top p. 481):
>
> "Substantial, as distinguished from incidental, sporadic, or infrequent service, is required."

In the light of the multiple service and numerous trips rendered by Hudson Transit Lines (and in addition the record shows Mountain Transit and Greyhound served this territory), and in the light of the sporadic and unsubstantial character of the incidental passengers which Adirondack carried during the period that it unlawfully operated, it surely cannot be said that such proof would satisfy the requirement that a finding of need for a new operation be supported by substantial evidence.

This Court said in the case of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, that substantial evidence meant the following:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In the light of the above decision by this Court, it is clear that on the above mentioned evidence, no reasonable mind could say that there was need for a new operation in this territory in competition with the existing carriers, who were fully and adequately serving the public. Therefore, the Court below had to find that there was no substantial evidence to support the erroneous conclusion of the Commission, which it reversed.

The fact is that Adirondack conceived the idea of using its surplus buses to crash the short haul and commuter service built up through ten years of Hudson's effort in this territory. It was to prevent such destructive compe-

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tition that Congress required that public convenience and necessity be proven, because such destructive competition usually leaves the public in the long run without any adequate service. If appellant's contention were correct, and the Commission could act regardless of the statutory requirements and standards, and regardless of the proof in the case, then all regulation would be stultified, and the Act of Congress would be made a nullity. In this case, the Interstate Commerce Commission heard the case. There was a carefully considered Examiner's Report, which substantially supported Hudson's position. There was an appeal to Division 5 of the Commission by all parties, and Division 5, in a long and carefully considered decision dated July 3, 1946, supported Hudson's position and explained the findings of the Examiner. The commission in that decision definitely found that there was no need for the proposed service for that portion of the route south of Monroe, and that the public need in that territory was being adequately filled by the existing carriers other than Adirondack. This long, detailed and carefully considered decision of the Commission, documented as it was by an analysis of the exhibits, was appealed by Adirondack to the Commission as a whole, which after further consideration affirmed the decision of the division, and accepted its determination as of the entire Commission. Then Adirondack filed a second Petition for Reconsideration, contrary to the Commission's rules of procedure, and without any hearing the Commission referred the matter back to Division 5, which then handed down another decision, which still adopted the findings made in the prior decision, but which added a few vague paragraphs (it is hard to know whether these paragraphs were findings of fact or mere reference to Adirondack's claims), which were unsupported by any proof in the case, and indeed contrary to the uncontradicted proof in the case. Then, the

Commission, having inserted an unsupported justification, reversed its prior conclusion and ended up with a finding of public convenience and necessity for an operation for which it made specific findings (the findings in the prior report were adopted except where specifically changed in the new report, and the essential ones were not changed), that there was no need due to the fact that the public need was being adequately filled by existing carriers.

The second report is analyzed in the decision of the Court below, which found nothing in the record to justify the conclusions there reached. This Court has held that an order of the Commission must be supported by the record facts. *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, and in the case of *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, this Court said:

> "A finding without evidence is beyond the power of the Commission."

The Commission has no right to act arbitrarily and contrary to the evidence of the case, and that is what it did in the decision and report complained of. This is made all the more apparent when we realize that the Commission protected all of the local carriers south of Monroe, and did not change its decision of denial with respect to them, but drew an arbitrary line at that point and changed its conclusion for the competitive territory we are interested in on the same record set of facts.

There is an obligation on the part of the Commission to observe the statutory standards prescribed by Congress, and it has no right to apply one test to some of the protestants in the case and, on the identical set of facts, another test or standard to us.

See—*United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

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In the case of *Loving* v. *United States*, 32 Federal Supplement, 464, affirmed on opinion below in 310 U. S. 609, the Court, in referring to the acts of the Commission, said:

> "But it must not act arbitrarily or capriciously in the considering of evidence presented to it."

That is exactly what the Commission did in its second decision and order complained of.

In this case, appellant has cited in support of its position the following cases:

United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

A reading of this case makes clear that appellant is in error, and that the Court below was correct in insisting that the statutory standards be followed by the Commission.

Texas & Pacific Railway Co. v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266.

This is not a case in point, but was an injunctive proceeding by one railroad against another involving conflicting testimony of whether a certain track construction was track extension or an industrial spur. Obviously, on conflicting testimony, the Commission had a right to use its expert judgment and discretion in resolving this conflict. In the instant case, we have no conflict, but indeed clear, uncontradicted proof supporting the Court below.

Virginia Stage Lines v. *United States of America*, 48 Federal Supplement 79.

This case is not in point because we do not question the fact that on an appropriate record, and based upon lawful proof, the Commission may authorize a new service to provide the public with the benefits of competition where the facts show that it is required in the public interest.

The Court below readily recognized this to be the law, but pointed out that that was never an issue in this case. Judge Swan, concerning this, said:

> "No such finding has here been made, nor is there any evidence to support such a finding."
>
> *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35.

This case is not one like the instant case where the Commission authorized a new line out of thin air, or out of its imagination. In the *Chesapeake & Ohio* case above mentioned, this Court sustained the action of the Commission in authorizing the new railroad line because of clear record proof of its need and of the inadequacy of the existing facilities. The record proof showed that not only would the proposed new line eliminate dangerous grades requiring costly operation, but that it would serve the users more safely and more efficiently, and save a substantial sum per ton in transportation, and the Commission, upon adequate proof, found that there was a need for this new construction to eliminate intolerable conditions in the existent operation there conducted. In the instant case, not only is the record devoid of any substantial evidence of need, but indeed the Commission in its specific findings has said that there is no need for the new Adirondack operation south of Monroe. The *Chesapeake & Ohio* case and the instant case are entirely different, since in the instant case there is no substantial evidence to warrant the conclusion reached.

> *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60.

Appellant attempts to use this case as the keystone of its argument. The only way in which it could do that is by misconstruing the Court's decision. An analysis of that case indicates that it supports the position taken by the Court below. Indeed, Judge Swan cited it as support

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for the statutory court's decision. No one quarrels with the law cited from that case by appellant, to wit, that Congress made the Commission the body to determine whether additional motor carrier service is required by the public convenience and necessity, and that the Commission has a right to exercise its administrative discretion in so determining. That does not change the fact that before the Commission can exercise such discretion, the statutory standards must be met by substantial evidence. In the *Parker* case, there was conflict of opinion between the majority and the minority, and a reading of both will disclose that on the issue here involved both majority and minority positions support the court below in the instant case. The *Parker* case was an application for auxiliary rail service by motor vehicle, and the record proof showed that there was no such type of service existent and available for use by the public. There were regular motor carriers serving in substance the same points, and the issue arose as to whether the record disclosed substantial evidence of need for the new rail motor carrier auxiliary service in view of the existence of the straight motor carrier lines serving the points there in question. The Interstate Commerce Commission, in its determination, differentiated between the two types of service, and found that there was an obligation on its part, under the Act of Congress, to preserve the inherent advantages of the various types of transportation, and that to preserve the advantages of rail type transportation it was necessary to allow the use of auxiliary motor carrier service, and that this type of service was not being presently afforded to the public by any carrier, and that it differed from the straight motor carrier type of service being afforded by the protesting motor carriers. On such a state of facts, and there was substantial evidence to support those findings, the Commission was within its bounds in determining that there was need for

the proposed new operation because there was no existing similar facility. Proof of need and of inadequacy of existing facilities can appear in a record, either in the form of negative proof showing that there just is not any such facility available to the public, or in affirmative proof that there are existing facilities but that they are not caring for or filling the public need. In the *Parker* case, this element making up necessity and convenience as that term of the Act has long been interpreted, was proven by the negative proof of the non-existence of such type of facility.

Therefore, on analysis, the opinion of the majority in the *Parker* case in no way changed the requirement that the Commission act according to the lawful standards, but found that it had on substantial evidence made adequate findings which fulfilled the requirements of those standards.

The position taken by Mr. Justice Douglas in his dissent was that the Commission erred in holding that the two types of service were different. He said, in substance, that they were the same thing, and therefore the Commission could not issue a certificate in the absence of proof of inadequacy of the existing straight motor carriers. This dissent, therefore, was based not upon any argument between the majority and minority concerning the lawful standards to be proven under the Act, but rather on a factual or practical interpretation of factual evidence touching upon the type of facility. Indeed, Justice Douglas made this clear when he said in his dissent:

> "For, if any applicant other than a railroad affiliate were before the Commission with an application for a certificate to serve this precise territory, it would have to show that existing transportation facilities were inadequate to serve the needs of the public efficiently."

Thus, both majority and minority uphold the legal standards inherent in the interpretation by both the Commission and the Courts in their interpretation of the elements mak-

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ing up necessity and convenience, as contained in Section 207(a) of the Act.

Conclusion

The court below bent over backwards to give Adirondack Transit Lines, Inc. more than the full benefit of the record proof. The only proof touching upon necessity and convenience was the proof showing Adirondack's past operations, both the type thereof, and the infrequent, sporadic and unsubstantial nature thereof in the territory in question. Although, as hereinabove shown, this could not constitute substantial evidence upon which to predicate a grant, the Court, nevertheless, provided in its order that Adirondack could be permitted by the Commission to continue the same type of operation that it had conducted during the period of its illegal operation. Thus, the Court gave Adirondack more than it was entitled to, and Adirondack has no just or substantial claim on this appeal.

The affirmance by this Court on the Motion annexed to this Statement Against Jurisdiction will clearly settle and affirm the interpretation of Section 207(a) of Part II of the Interstate Commerce Act, long and continuously adopted by the Interstate Commerce Commission itself, and accepted by this Court, as shown upon an analysis of this Court's decisions therein. It will re-affirm that Congress in using the words "public convenience and necessity" meant exactly what this Court said those words meant in the case of *Texas & N. O. R. Co.* v. *North Side Belt Railway Co.*, 276 U. S. 475, and as followed ever since that time in numerous Interstate Commerce Commission decisions.

There is nothing new or complicated in this case except appellant's attempt to twist isolated words or phrases from decisions of this Court into meanings utterly contrary to those intended.

No substantial issue is presented by this appeal. In the light of the law enunciated by this Court requiring support

by substantial evidence, it is clear on uncontradicted proof that the court below was correct in reversing the Commission decision because it was unsupported by any substantial evidence.

It would be unthinkable, at this late date, to substitute arbitrary and capricious discretion for the legal standards defining the meaning of public convenience and necessity. This Court cannot accept appellant's contention and preserve regulation by orderly process of law.

Because this is nothing more than an appeal seeking to discard the fixed Congressional standards long adopted by the Interstate Commerce Commission and the Courts, the appeal should be dismissed, and the judgment below affirmed on our motion.

Respectfully submitted,

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Dated: April 6, 1949.

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No. 104. ADIRONDACK TRANSIT LINES, INC. *v.* HUDSON TRANSIT LINES, INC.; and

No. 105. UNITED STATES ET AL. *v.* HUDSON TRANSIT LINES, INC. Appeals from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS dissent. *Martin J. Kelly, Jr.* for appellant in No. 104. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellants in No. 105. *Samuel Weiss* and *James F. X. O'Brien* for appellee. Reported below: 82 F. Supp. 153.